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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-74

PIPEFITTERS LOCAL UNION NO. 562, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the original panel of the court of appeals (Pet. App. A) are reported at 434 F. 2d 1116. The opinions of the court of appeals *en banc* (Pet. App. B) are reported at 434 F. 2d 1127.

JURISDICTION

The original decision of the court of appeals was entered on June 8, 1970. The judgment *en banc* was entered on November 24, 1970. A petition for rehearing of the *en banc* decision was denied on December 17, 1970. Mr. Justice White extended the time for filing a petition for a writ of certiorari to February 1, 1971, and the petition was filed on January 29, 1971,

and was granted on May 24, 1971. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment alleged an offense under 18 U.S.C. 610.

2. Whether the evidence supported petitioners' convictions of conspiring to violate 18 U.S.C. 610.

3. Whether the trial court's instruction to the jury that "the mere fact that the payments into the fund may have been made voluntarily * * * does not, in and of itself, mean that the money so paid into the fund was not union money" was erroneous.

4. Whether 18 U.S.C. 610, on its face or as construed and applied by the courts below, abridges petitioners' rights under the First, Fifth or Sixth, Amendments to the Constitution or under Article I, Section 2 and the Seventeenth Amendment.

5. Whether a special jury verdict that "a willful violation of [18 U.S.C. 610] was not contemplated" entitled petitioners to an acquittal.

STATUTE INVOLVED

In pertinent part, 18 U.S.C. 610 provides:

> It is unlawful * * * for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate,

political committee, or other person to accept or receive any contribution prohibited by this section.

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

For the purpose of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

STATEMENT

The petitioner-union and the individual petitioners [1] were convicted on September 19, 1968, by a jury in the United States District Court for the Eastern District of Missouri, of conspiring to violate 18 U.S.C. 610, which proscribes, *inter alia*, any contribution by

[1] One of the convicted individual petitioners, Lawrence L. Callanan, died while the petition for a writ of certiorari was pending.

a labor organization "in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative * * * are to be voted for * * *." Local 562 was fined $5,000, and union officers John L. Lawler and George Seaton were each sentenced to one year's imprisonment and fined $1,000. A panel of the Court of Appeals for the Eighth Circuit affirmed, one judge dissenting. The case was reheard *en banc*, and the court again affirmed petitioners' convictions.

In order to place the issues raised by petitioners—including the sufficiency of the evidence—in their proper setting, we make a rather comprehensive statement of facts, first outlining the scheme alleged in the indictment and then summarizing the relevant evidence which established the existence of this conspiracy.

A. THE INDICTMENT

The indictment charged that from about 1963 until the return of the indictment on May 9, 1968, the defendants' conspired to violate 18 U.S.C. 610, by having Local 562 make political contributions and expenditures in connection with certain federal elections (Par. 9; A. 14).

The indictment charged that they conspired to establish and maintain a special fund, entitled "Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund" (the "Fund"), which would be given the appearance of an entity separate from Local 562 to conceal what in fact were prohibited political contributions by the Local (Par. 10; A. 14); that the defendants, by creating this Fund, intended

to continue the union's practice of collecting for political purposes a fixed sum per day worked from its members and a fixed sum per day worked from non-members working on jobs within its jurisdiction (Par. 13; A. 15); that the defendants collected for the Fund $2.00 per day from non-members working within the jurisdiction of the Local in lieu of collecting for the Local treasury travel card dues at the prescribed rate of $8.00 per month (Par. 14; A. 15); that the defendants caused supervisory members of Local 562 to become agents of the Fund at job sites and at the local headquarters in St. Louis (Par. 15; A. 15–16); that the defendants caused these supervisors to distribute contribution agreement cards at all job sites of pipefitters and to inform newly employed pipefitters of the prescribed rates of participation; and that defendants distributed to the supervisors printed collection sheets for recording the number of hours worked by pipefitters and the amount of their contributions to the Fund (Par. 16; A. 16).

By these means, the indictment charged, the defendants conspired to make substantial contributions in connection with the 1964 and 1966 general election campaigns, with defendants Lawrence L. Callanan and John L. Lawler issuing checks drawn upon the Fund of approximately $150,000 (Par. 17; A. 16).

B. THE EVIDENCE

1. BACKGROUND: THE ECONOMIC POWER OF LOCAL 562

Local 562 has maintained a political fund since 1949 (A. 984). During the period of the indictment the

Fund collected about $1,230,986 (E. 1).[2] In 1964, the Fund disbursed about $97,347 and in 1966 about $45,146 in connection with the election of Federal candidates alone (E. 2). During this period the Local achieved a pre-eminent position among pipefitters, locals in Missouri. It exercises jurisdiction over all major jobs in more than half of Missouri, awarded to it by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, A.F.L.-C.I.O. (A. 976). Contractors requiring pipefitters on major jobs within this area must seek them from Local 562 (A. 979-980) despite the fact that within this same territory there are three other Pipefitters Locals affiliated with the same United Association (A. 978). According to its president, Edward Steska, Local 562 gives priority first to its own members and then, depending upon where the job is located, to members of other Pipefitter's Locals in Missouri (A. 979-980). The members of these other Missouri locals regularly work on jobs under the jurisdiction of Local 562; in such jobs they receive a higher wage rate than on jobs performed under the jurisdiction of their own local unions (A. 750, 757).

Despite its jurisdiction over half of the state, Local 562 early adopted a policy of limiting its membership "to just that number of people that they believed they could constantly find work for, whether employment was good or whether it was slack" (A. 1059). The

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[2] "E" refers to the third volume of the appendix filed by Appellants in the Eighth Circuit Court of Appeals, and lodged with the Clerk of this Court.

union's reluctance to admit new members made it indispensable for it to supply contractors with men from other locals. The local's minutes show the concern that work on the construction jobs not be left entirely to non-members, or "out-of-towners." (E. 389, 392).

Despite the provisions of the Constitution of United Association, Local 562 did not charge the out-of-towners the required travel card dues of $8.00 per month, or any fee whatsoever, for the privilege of working in its jurisdiction. Instead, as explained below, it required these non-members to contribute to its political Fund at the rate of $2.00 per day worked, which kept the total assessment rate for out-of-towners equivalent to what these men would have paid as members of Local 562. (See *infra*, pp. 11–14.)

2. THE EVIDENCE SHOWING THAT THE FUND WAS A DEVICE TO USE UNION FUNDS FOR POLITICAL PURPOSES

The government introduced evidence proving that contributions to the political fund were in fact (1) assessed by Local 562; (2) part of the dues structure of Local 562; (3) collected from non-members in lieu of union dues; (4) expended at times for union purposes; (5) diverted to the Callanan Gift Fund. In short, the government established that the Fund was merely an instrument of the union to use its funds for prohibited political purposes.

a. Contributions as assessments

In form and in general practice, contributions to the Fund were handled like union assessments. During the period of the indictment between January 1963 and 1968, contributions to the Fund were re-

corded on collection sheets, headed "Pipefitter's Voluntary Fund" with columns for names of contributors, daily hours worked, total hours worked and amounts paid. (See, *e.g.*, Govt. Exhs. 74–84; E. 4–14.) A second form employed in connection with the collection of contributions was a printed card entitled "Voluntary Contribution Agreement" (*e.g.*, E. 3, 537). The card contained a blank space to indicate what "% per 8 hour day" the subscriber was to contribute, and had a space for the contributor's signature, the date and the "Witness" (E. 3, 537).

Edward W. Gissing, a fifteen-year member of Local 562 who was a foreman, testified that he handed out voluntary contribution agreement cards to the men on his job along with their withholding forms (A. 152–153, 169; Govt. Exhs. 74–84). Asked whether anyone was fired for failure to contribute, he said, "I don't know of anybody that never did pay it" (A. 170; Govt. Exhs. 77, 79; E. 7, 9). The purpose of keeping records on the contributions, according to Gissing, was so "the office would know who contributed, and how much" (A. 163). He could not name any person working on his crew who did not make his full contributions (A. 164–165). That other foremen similarly treated the "contributions" as a kind of dues to the union is borne out by their testimony. (See, *e.g.*, A. 178–194.)

Unlike other employers, who began withholding dues and assessments from paychecks of union members after October 1963, Anheuser-Busch did not check off dues and assessments for the union. Thus, the union itself collected dues and assessments from its

men working there. The testimony of Jack Collom, a member of the Local for twenty years and union steward at Anheuser-Busch for three years (A. 214), indicates that there were similar collection sheets for regular assessments and fund contributions, that all pipefitters working there paid both assessments and contributions, usually in a lump sum, and that records were kept of those who fell behind in their contributions as well as in their assessments. (See Govt. Exhs. 90–101; E. 15–179; A. 219, 227–228.)

A number of witnesses acknowledged using the term "back assessment" to note on their collection sheets contributions not made promptly to the Fund (A. 289–290, 293, 318, 425).

When one foreman was instructed by someone at the union hall not to collect from one man (A. 456), he noted "no assessments" after the man's name (A. 457; Govt. Exhs. 88C, 89D, 89G, 89I). One witness who began to refer to a contribution as an "assessment," explained that this was a "slip of the tongue" and that he had been told by others waiting to testify for the petitioners not to call contributions assessments (A. 532–533).

There were, as petitioners stress in their brief (Pet. Br. 37), a number of individuals who testified that they contributed regularly to the Fund and made their contributions to the fund "voluntarily."

Finally, on the subject of collections as assessments it is noteworthy that the Local's minutes of November 21, 1962, in which is reported the recommendation of the Executive Board that a 4% assessment be levied, state, "Under our present wage scale this should give

the secretary treasurer 92½ cents a day per man and your voluntary political, educational, and legislative fund 55½ cents a day per man" (E. 301).

b. Contributions as part of the financial structure of Local 562

As previously noted, Local 562 has had a political fund since 1949 (A. 972). In 1949, the regular assessment imposed on union and non-union members was $.25 per day; each contributed the same amount to the Fund. In November 1962 the assessment, on which the union relies to operate, became $.50 per day, and was paid by both members and non-members who were working on jobs within Local 562's jurisdiction (A. 985; Def. Exhs. GG, HH; Govt. Exhs. 63–68). Union dues, paid by members only, were $3.50 per month, have always been nominal in amount and were largely passed along to the United Association.

After January 1963, the Local ceased to collect the $.50 assessment from non-members but the rate of contribution to the Fund for non-members was increased, so that despite the removal of the assessment, they continued to pay the same total amount as did a member, taking into account the latter's regular assessment plus his contribution to the Fund. Thus between January 1 and October 14, 1963, non-members contributed to the Fund at the rate of $1.50 per day worked; whereas members contributed $1.00 per day (A. 487–500; E. 532–534). When added to the members' assessment of $.50 per day worked, members paid the same total of $1.50 per day as non-members. After October 1, 1963, when a new contract became

effective, the assessment of members increased to $1.00 per day worked. (E. 532, 534; A. 494–496). The rate of contribution to the Fund for non-members was raised to $2.00 per day to match the total assessment and contribution of members (E. 533). Effective in 1966, the assessment rate for members was increased from 2½% to 3¾% of gross wages (A. 496; E. 534), from approximately $1.00 per day worked to $1.50. On the same date, the contribution rate of members to the political fund was reduced from $1.00 to $.50 per day worked (E. 532).

The union minutes of the Executive Board meeting of November 3, 1965, show that the $.50 increase in the union assessment of members was explicitly tied to the $.50 decrease in the contribution rate for members. After referring to the financial condition of the union treasury, the Board recommended an increase in assessment from 2½% of gross wages to 3¾% of gross wages, but added: "We believe when the details are explained to all of you, all will agree as we do on this matter. Because this will be not one extra penny *cost to members* of Local Union 562" (E. 475, emphasis added).

c. Contributions from non-members paid in lieu of assessments and dues

The Constitution of the United Association provides that a pipefitter who works in the territory of another local union must pay that local a travel card fee, which is set at $8.00 per month. Traveling members are not allowed to be charged any other fee ex-

cept the travel card fee (Def. Exh. HH; A. 1010–1014).[3] Despite these provisions, the "out-of-towners" were paying $2.00 per day into the political fund (see *supra* p. 11); this was equvalent to the total assessment and contribution of members and, over a month, five times the amount of the travel card fee.

Several out-of-towners explained that they contributed to the Fund because they were paid more on Local 562 jobs (A. 736, 750). One non-member calculated that he got from $30.00 to $40.00 more per week on Local 562 jobs than on jobs under the jurisdiction of his own local (A. 757). He testified that "except for that, [he] wouldn't be voluntarily paying anything * * *" (A. 759).

William Copeland, an out-of towner, testified that when the contribution rate increased from $1.50 to $2.00 per day, he refused to pay (A. 201). On the following Friday he was laid off the job (A. 202).

Another non-member explained why he signed the agreement card and paid $2.00 a day. "It was just, it was my understanding if I wanted to work and wanted to get a job, that I had to sign, so I just went ahead and signed it" (A. 270).

Passing reference made in the union's minutes to a special event characterizes the contributions that out-of-towners make to the Fund as being in fact payments to the union: "He [President Steska] explained that a barbecue was given for the U. A. members with out-of-town cards who pay into our local union and

[3] "* * * except for such fines as may be lawfully levied under this section, he shall not be required to make any additional payments of any kind for any reason whatsoever" (A. 1012).

their wives, who are working in our jurisdiction on jobs in the northern part of the state * * *" (E. 465–466).

The payment of contributions depended upon and resulted from working under the jurisdiction by Local 562, the same jurisdiction which entitled Local 562 to the travel card fee which they did not collect. A former member of Local 798 of Tulsa, Oklahoma, testified that he and others were employed by an Oklahoma contractor and were working along a pipeline starting at Warrensburg and going to Columbia, Missouri. Believing that Columbia was in Local 562's jurisdiction, these out-of-towners anticipated having to pay to the political fund (A. 404). The men expressed their concern to the steward for the Kansas City Local, and he telephoned Local 562 in St. Louis. He reported that they could forget about contributing because the job was in Kansas City's rather than 562's jurisdiction (A. 405–406).

When one supervisory foreman, Vincent Polito, overheard some workers from San Francisco complaining that they had obligations to their own local and were not interested in the voluntary fund (A. 476), he telephoned petitioner Callanan, who instructed Polito not to take any money from these men (A. 478). Asked why he felt it was necessary to call Callanan about this matter, Polito explained, "I just didn't want him to think that I wasn't collecting my Voluntary, or getting the Voluntary money and not being able to show where it went to" (A. 480).

In another circumstance non-members did not have to pay the $2.00 per day because there had been a

jurisdictional dispute between Local 562 and another local, and an agreement had been reached that money for the Fund would not be paid for that job (A. 929–934, 1046–1047).

d. Expenditures from the fund for non-political union purposes

The Fund had no constitution or by-laws, no minutes of meetings, no membership roll and no recording secretary (A. 1018–1019). No audit of its books was conducted (A. 103), and the Fund made no accounting for its expenditures (A. 1077). The ledger maintained for the Fund in 1963 and 1964 (Govt. Exhs. 1–2) was divided into separate categories, including expenditures for political, charitable, defense, educational and legislative purposes (A. 97). After 1964, however, the breakdown was discontinued; the ledger became simply an itemization of checks, payees and amounts (A. 98).

The Local's accountant characterized one $10,000 disbursement from the Fund under the heading "aid to members" as representing "payments to people who apparently were financially in need at a time there was a strike existing" (A. 802, see A. 553–554, 559). Another $191,000 of Fund money was used to build a recreation center in Clarksville, Missouri, owned in part by the Union (A. 787–788, 806, 1075; Def. Exh. AA). The center was to be used as a retirement home for steamfitters (A. 683) and the union membership was told that it had been paid for out of union funds (A. 683, 729–730).

The close interrelationship between the Fund and Local 562 is manifested in a reference contained in

the union's minutes. Petitioner Callanan did not hold any office in Local 562 between October 1, 1961 and September 30, 1967 (Tr. 327–330; Govt. Exh. 63–67). Callanan became Director of the Fund sometime in 1965 (A. 105). The minutes of the executive board meeting of March 9, 1966, reflect the nomination of persons to serve on the committee to represent Local 562 in the conduct of contract negotiations:

> It is the recommendation of your executive board that Business Manager John L. Lawler, the director of our political, education, legislative, charity and defense fund, Lawrence L. Callanan, President Edward Steska, Vice-President George Seaton and Executive Board Member Virgil Walsh comprise the negotiating committee representing Pipefitters Local Union No. 562; and that this committee be given full power and authority to negotiate and reach a new agreement with the Mechanical Contractors Association of St. Louis, Mo. on wages, hours and working conditions (E. 493–494).

e. The Callanan Gift Fund

Between June and September of 1966, contributions to the political Fund were completely suspended in favor of contributions, at the same rate, to the "Callanan Gift Fund" (A. 117–128, 221, 771; E. 180–285). The purpose of this fund was to give money to petitioner Callanan "to do with [as] he [saw] fit" (A. 671). As with the Voluntary Fund, the workers all signed "Gift Fund" agreements (A. 117–118). The Gift Fund also employed a printed collection sheet almost iden-

tical to the political Fund's collection sheets. (Compare Govt Exh 98 with 101; E. 165–179 with E. 180–285.)[4]

Defendant Callanan's son-in-law, Eddie Beck, an employee of the union, was in charge of Gift Fund collections, which he received in the political fund office (A. 117–128).

Workers, both members and non-members, contributed regularly to the Callanan Fund, apparently without protest or inquiry into the purpose of the fund.

C. THE INSTRUCTIONS TO THE JURY

The trial court instructed the jury that Section 610 was violated if the political fund was a subterfuge through which the union itself made proscribed political contributions. The court instructed that the voluntary nature of the payments by members was one of the elements to be considered—but was not dispositive—in determining whether the monies of the fund were in reality union monies. The court's instructions to the jury in determining whether the Fund was a union fund were as follows (A. 1112–1116):

> You will note that Section 610 prohibits contributions by labor organizations for use in connection with an election for a federal office. It does not prohibit any person from making or agreeing to make such contributions or setting

[4] A member of another Local was asked to explain why he was willing to pay $2.00 per day worked to the Callanan Gift Fund when members of Local 562 were giving only $.50. He answered, "Well, I don't know. I don't actually know what kind of dues they have, plus the Voluntary Fund, see. So I'm really not up to date on that, see" (A. 771).

up an independent fund for such purpose separate and distinct from union funds either alone or in conjunction with others, simply because such person happens to be a member of a labor organization. That is, the statute is not violated unless the contribution is in fact and in the final analysis made by the labor organization.

In this case evidence was offered by the Government to the effect that funds were contributed to or on behalf of candidates for federal office and that such funds were paid out upon checks drawn upon the Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund. It is necessary, therefore, that the evidence establish that the Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund was in fact a union fund, that the money therein was union money, and that the real contributor to the candidates was the union. As to this issue, the defendants contend that the fund in question was a bona fide entity separate and apart from the union, established by the voluntary good faith act of members of the pipefitters Local 562 and others, from which contributions to candidates were made on behalf of the persons who created the fund and not on behalf of the union. On the other hand, the Government contends that the fund was a mere artifice or device set up by the defendants and others as a part of the alleged conspiracy to give the outward appearance of being an independent and separate entity but in fact constituting a part of union funds.

In determining whether the Pipefitters Voluntary Fund was a bona fide fund, separate

and distinct from the union or a mere artifice or device, you should take into consideration [2,071] all the facts and circumstances in evidence, and in such consideration you may consider

1. Whether or not payments to the fund were routinely made at regular intervals at job sites,

2. Whether or not payments to the fund were routinely collected by union stewards, foremen, area foremen, general foremen, or other agents of the union,

3. Whether or not the payment to the fund was determined by a formula based upon the amount of hours or overtime hours worked upon a job under the supervision of the union,

4. Whether or not payments to the fund were at one rate for 562 members and at a different rate for members of other unions,

5. Whether or not payments to the fund began, continued and terminated with employment on a job under the jurisdiction of the union,

6. Whether or not monies of the fund were used to provide benefits to union members in their capacity as members,

7. Whether or not payments to the fund by members of other unions were in lieu of payments to the union in the form of travel card dues in the amount of eight dollars per month,

8. Whether or not monies of the fund were used in part to promote activities properly permitted to the union pursuant to Section 2.05 of its Constitution and by-laws,

9. Whether or not payments to the fund were made by those affiliated with the union to the general exclusion of other classes of persons or organizations,

10. Whether or not contributions to the fund were required as a condition of employment or continued employment of membership in Local 562,

11. Whether or not the individuals who contributed to said fund signed a voluntary contribution agreement,

12. Whether or not the contributions to said fund were made voluntarily or involuntarily,

13. Whether or not the monies contributed to said fund were kept separate and distinct from the funds of Local 562,

14. Whether or not some persons who worked under the jurisdiction of Local 562 did not contribute to said fund,

15. Whether or not the monies of said fund were used in part to promote activities which were prohibited to Local 562 by its Constitution and By-Laws,

16. Whether or not said fund was established and maintained pursuant to the advice of counsel,

17. Whether or not the monies of said fund were reported to the Department of Labor on the LM–2 forms, which required the reporting of monies of Local 562,

18. Whether or not expenditures from the fund were under the control of the union and its officers,

19. Whether or not records used in the collection of the payments to the fund are similar to those employed from time to time by the union in the collection of its regular dues and assessments.

If upon consideration of all the facts and circumstances in evidence you find that the contributions to the candidates for federal office

for political purposes were in fact made out of union funds by the union, and that the individual defendants as officers of the union, willfully consented thereto, then you may take this fact into consideration together with other facts in evidence in determining whether there was a prior understanding or agreement so to do.

* * * * *

A great deal of evidence has been introduced on the question of whether the payments into the Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund by members of Local 562 and others working under its jurisdiction were voluntary or involuntary. This evidence is relevant for your consideration, along with all other facts and circumstances in evidence, in determining whether the fund is a union fund. However, the mere fact that the payments into the fund may have been made voluntarily by some or even all of the contributors thereto does not, of itself, mean that the money so paid into the fund was not union money.

D. THE VERDICT

After admonishing that it could convict petitioners of the offense charged only if they "knowingly, willfully and purposely did an act which the law forbids" (A. 1110), the trial judge told the jury that he had prepared two verdict forms for their use and that they were to return their verdict on one of the two forms (A. 1119). The first form was to be used "to return a verdict of either guilty or not guilty of the offense charged;" the second form should be used

"only in the event you find one or more of the defendants guilty of the willful conspiracy charged and further find that the conspiracy * * * did not contemplate a willful violation of Section 610" (*ibid.*). The jury returned its verdict on the second form, finding that petitioners each were guilty as charged but that "a willful violation of Section 610 of Title 18, United States Code, was not contemplated" (A. 1126). Petitioners made no objection to use of the two verdict forms or to the instructions concerning them.

E. THE APPEAL

Petitioners urged in the court of appeals that 18 U.S.C. 610, on its face and as applied by the trial court, was constitutionally defective under Article I, Section 2 of the Constitution and the First, Fifth, Sixth, and Seventeenth Amendments; that the indictment did not allege an offense; that insufficent evidence supported the jury's verdict; and that the jury's determination that a willful violation of 18 U.S.C. 610 was not contemplated required acquittal of conspiracy. In their brief petitioners insisted that these matters required a reversal "without a new trial, and no request is made for a new trial," (Pet. App. 25) and limited the relief sought to "a reversal and discharge of the defendants." The court affirmed with the majority (Van Oosterhout and Blackmun, JJ.) explicitly considering and rejecting each of the grounds urged by petitioners. Judge Heaney, in dissent, objected to the trial court's instructions on the "voluntariness" issue, and concluded that they necessitated a new trial.

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The court then granted petitioners' request for rehearing *en banc*. In a supplemental brief, petitioners adopted the reasoning of Judge Heaney's dissent and asserted that the erroneous instructions on "voluntariness" required a new trial. The *en banc* court affirmed petitioners' convictions *per curiam*, for "the reasons set out in the panel majority opinion * * *." In a separate opinion, the four judges making up the majority further expressed the view that petitioners, by their explicit presentation on the original appeal, "had deliberately and consciously elected to abandon and waive any and all claims of prejudicial trial errors * * *" (Pet. App. 25). Three dissenting judges urged reversal and a new trial for the reasons assigned in Judge Heaney's earlier opinion. Because they thought the statute does not preclude the use of funds voluntarily contributed by union members, they found it unnecessary to consider the constitutional issues.

SUMMARY AND INTRODUCTION TO ARGUMENT

The foundation of petitioners' arguments with respect to the indictment, the evidence, the judge's instructions to the jury, and the constitutionality of the statute itself, is their contention that the courts below "construed Section 610 as prohibiting officers, agents and members of a union from forming a parallel political organization and utilizing the union leaders, officers, and agents in such political organization, in the obtaining, pooling and expending of direct voluntary

contributions for political purposes" (Pet. Br. 79). We believe that petitioners' formulation misstates the holding of the courts below and misconstrues the issues before this Court.[5] The essential charge of the indictment and the theory on which the case was tried was that the Fund, although formally set up as an entity independent of Local 562, was in fact a union fund, controlled by the union, contributions to which were assessed by the union as part of its dues structure, collected from non-members in lieu of dues, and expended, when deemed necessary, for union purposes and the personal use of the directors of the Fund. The trial court unequivocally instructed the jury that in order to convict petitioners, it had to find that the Fund "was in fact a union fund, that the money therein was union money, and that the real contributor to the candidates was the union" (A. 1112). As set forth in the Statement, the trial judge instructed the jury to take into consideration nineteen factors to be considered in

[5] Apart from their substantive defects, there may be independent reasons for rejecting these arguments of petitioners. Insofar as these arguments, if valid, would lead to a new trial rather than discharge of the petitioners, this Court might decide that they were not preserved below, because, as the court of appeals held, they were not raised before the original panel.

Even if petitioners' interpretation of the statute were accurate, this would not lead to a dismissal grounded on the invalidity of the indictment or the insufficiency of the evidence. This indictment properly charged a violation of Section 610, in charging that Local 562 made political contributions (Par. 10; A. 14) whether or not proof of the involuntariness of the contributions to the Fund would be required to sustain a conviction. And there may well have been enough evidence to sustain a conviction under petitioners' theory of what the statute requires.

deciding whether the Fund was or was not a union fund. Among these were the regularity of payments, the method of collection, whether or not contributions to the fund were required as a condition of employment and the voluntariness of the payments. Whether the evidence supports the charge in the indictment and whether Section 610, as applied, is constitutional must be determined on the basis of this interpretation. In other words, the issue which this case presents is whether Congress did—and may validly—prohibit labor unions from using regular union funds to make direct monetary contributions for political purposes to candidates in federal elections.

Our position is (1) that the evidence shows that the Fund was in reality not a separate entity and the Fund's money was in reality union money and (2) that the trial court was entirely correct in the treatment of the issue of voluntariness as merely one element—and not necessarily the conclusive element—in determining whether the political fund was, under the facts here, in reality a union fund.

Petitioners misconstruction of the question presented also answers their constitutional objections. Section 610 as construed and applied in this case has a narrow scope serving the legitimate congressional objectives of preserving the purity of the electoral process and the protection of the rights of dissenting union members, while permitting unions and union members to express their political views and make contributions through separate and voluntary political funds. As applied, Section 610 is neither vague nor does it discriminate

against the laboring class. Finally the jury's verdict was not inconsistent, but merely distinguished between misdemeanor and felony violations of Section 610.

ARGUMENT

I

THE INDICTMENT AND THE EVIDENCE SUBMITTED TO THE JURY UNDER THE COURT'S INSTRUCTIONS PROPERLY CHARGED AN OFFENSE AND SUPPORTED THE CONVICTIONS UNDER 18 U.S.C. 610

Since the petitioners attack the indictment, the sufficiency of the evidence and the propriety of the charge on the same grounds, *viz.*, that they allegedly permitted a conviction of the Union based on political expenditure of a separate political organization deriving its funds from voluntary contributions, it is convenient to deal jointly with the three attacks.[6]

Eighteen U.S.C. 610 provides in pertinent part as follows: "It is unlawful for * * * any * * * labor organization to make a contribution or expenditure in connection with any [federal] election * * *." Petitioners contend that their activity does not fall within the statute because even the indictment does not charge that "political contributions were * * * really made by Local 562, and no contention was ever so made" (Pet. Br. 52). Petitioners appear to contend that the "separateness" of the Fund from Local 562 was a fact conceded in the indictment and proven by the evidence (Pet. Br. 76). However, the identity of

[6] But see note 5, *supra*, p. 23.

the Fund with the Union was the principal allegation of the indictment, the major thrust of the evidence (*supra,* pp. 7–16) and the crux of the charge.

The indictment charged that petitioners established the Fund to "have the appearance of being a wholly independent entity, separate and apart from Local 562," and "thereby conceal the fact that *Local 562 would make contributions and expenditures in connection with certain elections*" (Par. 10; A. 14; emphasis added). The indictment outlined petitioners' scheme to conceal the true nature of their activity and alleged that such activity amounted to an unlawful use by Local 562 of its own regular union funds contrary to 18 U.S.C. 610. Applicable here is the Ninth Circuit's observation in *United States* v. *Lewis Food Company,* 366 F. 2d 710, 713 (C.A. 9):

> In our opinion, the allegation in the indictment that the corporation made an "expenditure" for the stated purpose, necessarily infers an allegation that general corporate funds were used. * * *

Similarly the evidence showed that the monies of the Fund were Union monies and that the Fund itself was indistinguishable from the Union. The evidence of the practical identity of the Fund and the Union has been marshalled above (*supra,* pp. 7–16); it showed (1) that the purported contributions to the Fund were in fact assessments imposed by Local 562; (2) that these "contributions" were part of the dues structure of the Local, evidenced particularly by the required payment of contributions by "out-of-towners"; (3) that assessment and contribution rates were manipulated to meet changing union needs; and (4)

that Fund monies were used for such union purposes as strike benefits, the purchase of land for a union recreation center and a gift fund for petitioner Callanan. In sum, the evidence showed that Local 562 made the political contributions involved here out of its own funds.

Finally, the court charged that before the jury could convict:

> It is necessary, therefore, that the evidence established that the Pipefitters Voluntary Political, Educational, Legislative, Charity and Defense Fund was in fact a Union Fund, that the money therein was union money, and that the real contributor to the candidates was the union (A. 1112).[7]

In our view the charge of the indictment and the finding of the jury—based on competent evidence and under careful instructions—that Local 562 made political contributions are sufficient to sustain the convictions. Petitioners argue, however, that the court's charge was erroneous because it permitted the jury to convict without finding that payments to the Fund were "involuntary."

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[7] It is still petitioners' assertion that the Fund was a separate organization similar to the old C.I.O. P.A.C. and the present COPE, and countless other independent political committees supported by voluntary labor contributions (See Pet. Br. 92). If that were all the evidence established here, we would agree that the government failed to make its case. Nor do we dispute appellants' conclusion, following their review of the legislative history of Section 610, that a union could "establish a political organization for the purpose of receiving ear-marked political monies directly from union members * * *" (Pet. Br. 62). Our point is that that is precisely what Local 562 did not do in this case.

It is not necessary for a violation of the statute that payments to the Fund were "involuntary." The fact that all shareholders may agree to a political contribution or expenditure by a corporation out of its treasury would not make such a contribution or expenditure legal. As the Court pointed out in *Lewis Food Company, supra*, p. 713, "The statute itself, however, does not provide an exception when stockholders consent." The same reasoning applies to a labor organization. As the Supreme Court pointed out in *United States* v. *Auto. Workers*, 352 U.S. 567, 589, "[t]he evil at which Congress has struck in § 313 [the predecessor to present Section 610] is the use of corporation or union funds to influence the public at large to vote for a particular candidate or a particular party".

Of course—as we discuss below (*infra*, pp. 36–39)—the legislation has as one of its principal purposes the protection of minority interests from overbearing union leadership; but this is only one of the dual considerations underlying the statute. As this Court pointed out in *United States* v. *C.I.O.*, 335 U.S. 106, 113, with regard to the present statute's earliest legislative antecedent (the Act of January 26, 1907, 34 Stat. 864–865):

> This legislation seems to have been motivated by two considerations. First, the necessity for destroying the influence over elections which corporations exercised through financial contribution. Second, the feeling that corporate officials had no moral right to use corporate

funds for contribution to political parties without the consent of the stockholders.

The opinion for the Court in the *C.I.O.* case further expressed the view that this same dual purpose applied to the statute's coverage of union activities.[8] At least one of these purposes—the elimination of "the corroding effect of money employed in elections by aggregated power," *United States* v. *Auto. Workers, supra,* 352 U.S. 582—would be clearly served by this conviction even if the payments into the union were wholly voluntary.[9] And the language of the statute covers such a circumstance.

However, in deciding this case the Court need not decide whether a union could—consistent with Section 610—use for political purposes wholly voluntary donations from workers. The evidence at trial and the charge to the jury showed that "voluntary" was used at trial in a way consistent with the assessment of the monies for union purposes and did not imply a free association of workers for political purposes.

The Local members and non-members who spoke of making their payments to the Fund "voluntarily"

[8] As the Court said (335 U.S. at 115): "It was felt that the influence which labor unions exercised over elections through monetary expenditures should be minimized, and it was unfair to individual union members to permit the union leadership to make contributions from general union funds to a political party which the individual member might oppose."

[9] The facts of this case do not present the question of the legality of political contributions by unions of monies collected from donations of members which were truly voluntary, and held segregated for that special purpose and utilized solely for that purpose.

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were saying in essence that they paid willingly. It was in that sense of "voluntary" that the judge charged "the mere fact that the payments into the fund may have been made voluntarily by some or even all of the contributors thereto does not, of itself, mean that the money so paid into the fund was not union money" (A. 1116). This kind of willingness or voluntariness does not mean that the payments, regularly collected by union representatives on the basis of a fixed assessment for time worked, were voluntarily made in the sense of a deliberate choice to support certain political ends. Many witnesses testified that they paid their regular union dues "voluntarily" (*e.g.*, A. 324, 437, 462). Many paid their contributions to the Callanan Gift Fund willingly or voluntarily in that sense. But it defies normal understanding to assume that each Local member would contribute exactly the same amount to the Fund—and that each out-of-towner would contribute four times that amount—if he did not regard the payment of this money as part of his obligation to the Union.

We do not question "that a union could establish a political organization for the purpose of receiving ear-marked political monies directly from [voluntary contributons of] union members" (Pet. Br. 62), but that was not done by petitioners. Although the Fund had a separate bookkeeping arrangement, the money was assessed and collected in the same way as union dues. This method was inherently coercive, whether or not deliberate refusals to pay were sanctioned. "Contributions" to the Fund were constantly

referred to as "assessments" (A. 290, 293, 294, 318, 380, 425, 431, 441, 456). The foremen once each week uniformly collected the same amount per day worked from all of the men in their charge (A. 121, 325). Several foremen testified that they knew of no one who refused to pay[10] (A. 170, 187) and at least two foremen were unable to distinguish between these and other assessment charged by the union (A. 297, 320). Each payment was noted in a book which the foreman turned in with the money to the union hall (A. 216). If a workman did not pay for one week, the foreman or steward would write "owe" in the book (A. 161, 256). If a workman had not paid the week before and hence paid double the following week, the foreman often wrote "back assessment" in the book to account for the greater amount (A. 293, 318, 425, 449). Several men testified that they thought such contributions were necessary if one were to get work (A. 201, 212, 270, 402). The evidence here does not show men pooling their resources to support a cause in which they believe, or even each Local member and non-member making a deliberate choice whether to support political ends promoted by the union. Rather, it shows the union assessing workers for a political fund to which the workers "contribute" because they feel it their obligation to do so. The existence of the Callanan Gift Fund proves this point. For three months contributions to the Fund were completely suspended and everybody "contributed" the same

[10]Apart from exceptions such as hardships cases (A. 183, 620–21) and apprentices (A. 181, 307, 454) who were specifically exempted by the union officers.

amount to petitioner Callanan, apparently without complaint or inquiry.

It is not significant that the union was able to produce a number of men who did not contribute to the Fund. For one thing collections seem to have been neglected on various small jobs (*e.g.*, A. 577). More important the union officials, aware of 18 U.S.C. 610, knew that they had no right to demand contributions and it is not surprising that, in the face of a direct refusal to pay, they would usually not try to compel payment. Such compulsion was not required because, by the time covered by this indictment, the Fund was so well established that few workers considered the possibility of non-payment. By then the Fund had been in existence for about fourteen years and had become accepted as a part of Local 562's operation. It was not necessary to employ threats to insure cooperation. Payment of the assessment was a fact of this union's life. These regular, fixed payments may have been made willingly but they were not in any realistic sense voluntary contributions to a non-union political entity.

The trial court, we submit, correctly instructed the jury that it was necessary to look at the total relationship of the Fund to the Union in order to determine whether the Fund was merely the alter ego of the Union and whether the Fund's monies were in reality the Union's monies. In this case, the collection techniques show that the union was using its control over employment to require payments to the Fund. Furthermore, although there was no evidence of a direct flow of cash from the union treasury into the fund, this was accomplished indirectly by collecting fund "contribu-

tions" from non-members in lieu of the travel card fee, which would have gone into the union treasury (A. 271–72). In addition, the disposition of the monies showed that the political fund was not regarded as really separate from the monies of the union. Fund monies were used for strictly union activities like strike benefits and a retirement home. Any of these elements might well be enough to show that there was a violation of the statute. Their combination establishes clearly that this political fund was not a vehicle for workers freely to associate together to express their political beliefs and facilitate the making of contributions to candidates of their choice. The money here expended was, as the jury found, union money collected by use of union power and dispensed as the officials of the union decided.

II

CONGRESS MAY VALIDLY PROHIBIT THE EXPENDITURE OF UNION FUNDS FOR DIRECT POLITICAL CONTRIBUTIONS TO CANDIDATES FOR FEDERAL ELECTIONS

Unlike the situations in which the statute, as applied to labor unions, has previously come before this Court,[11] there is no doubt in this case that the particular activity at issue is a "contribution or expenditure" within the meaning of the statute. There is no doubt that Union funds were expended for direct political contributions to federal candidates, contributions which, under the statute, unions are forbidden to make. The

[11] *United States* v. *C.I.O.*, 335 U.S. 106; *United States* v. *Auto. Workers*, 352 U.S. 567.

constitutional question is whether Congress may validly forbid labor unions from making such direct contributions. By sustaining the indictment in *United States* v. *Auto. Workers*, 352 U.S. 567—and thus holding that there are at least some situations to which the statute may validly be applied—this Court has already determined this issue.[12] Direct contributions from Union funds to political candidates are the core of this statute.

A. THE STATUTE IMPLEMENTS PERMISSIBLE CONGRESSIONAL OBJECTIVES

Section 304 of the Labor-Management Relations Act of 1947, the predecessor of 18 U.S.C. 610, permanently extended to labor organizations the ban against political contributions which had been applied to corporations and national banks since 1907. See *United States* v. *C.I.O.*, 335 U.S. 106, 115. The underlying purpose of this ban is essentially twofold: (1) to prevent the manipulation of the elective process by the great aggregations of wealth assembled by both corporations and unions, and (2) to foreclose the use of general corporate or union funds to support ideas and candidates opposed by a minority of the shareholders or union members. As the Supreme Court expressed the legislative aim in *C.I.O., supra* (335 U.S. at 115):

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[12] Section 610 and its predecessors have been upheld in a number of lower court cases against constitutional attack. *United States* v. *United States Brewers' Association*, 239 Fed. 163 (W.D. Pa.); *United States* v. *Painters Local No. 481*, 79 F. Supp. 516 (D. Conn.), reversed on other grounds, 172 F. 2d 854 (C.A. 2); *United States* v. *Construction and General Lab. Local No. 264*, (W.D. Mo., unreported opinion of October 18, 1951—Case No. 18,039).

> It was felt that the influence which labor unions exercised over elections through monetary expenditures should be minimized, and that it was unfair to individual union members to permit the union leadership to make contributions from general union funds to a political party which the individual member might oppose.

Or as stated in *Auto. Workers, supra* (352 U.S. at 575):

> [The statute's] aim was not merely to prevent the subversion of the integrity of the electoral process. Its underlying philosophy was to sustain the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.

In our view, these are legitimate and compelling legislative objectives which as implemented by Section 610 do not place improper restraints on the constitutional rights of unions or union members.

1. The purity of the electoral process

It is established beyond doubt that Congress has the power to enact legislation aimed at preserving the purity of the electoral process.[13] *Burroughs and Cannon* v. *United States,* 290 U.S. 534; *Smiley* v. *Holm,* 285 U.S. 355, 360; *Ex Parte Yarbrough,* 110 U.S. 651. In the *Burroughs* case the Court said:

> To say that Congress is without power to pass appropriate legislation to safeguard [a Presidential] election from the improper use of money to influence the result is to deny to the

[13] Pertinent constitutional provisions are Art. 1, §§ 2, 4, 8, Clause 18 and the Seventeenth Amendment.

nation in a vital particular the power of self-protection. 290 U.S. at 545.

In *United Public Workers* v. *Mitchell,* 330 U.S. 75, the Court sustained the congressional power to forbid any employee of the federal executive branch from "taking 'any active part in political management or political campaigns.' " The *Mitchell* decision was based on *Ex Parte Curtis,* 106 U.S. 371, in which "[t]he right to contribute money through fellow employees * * * was held not to be protected by any constitutional provision." 330 U.S. at 97. See also *United States* v. *Wurzbach,* 280 U.S. 396. The prohibition of contributions by aggregates of wealth such as corporations and unions is an appropriate means for safeguarding the electoral process.

2. The protection of the rights of individual members

Congress recognized that, in modern times, unions have become powerful quasi-governments in their own right with "taxes", elected officials, and a hierarchy of power.[14] Like any other aggregation of power, while they are subject to certain constraints imposed by other entities, they nevertheless have considerable control over the destiny of their constituency. They directly influence the basic economic issues of their members'

[14] In 1968 according to the Bureau of Labor Statistics, 20,733,000 workers belonged to a union, the great bulk of these under one oganization, the AFL–CIO. Union treasuries controlled $2,970,000,000 in 1567. 1969 *Statistical Abstract,* p. 238. From Dept. of Labor, Office of Labor Management and Welfare Pension Reports. (This figure includes cash on hand, investment assets and union administered pension plans. It excludes corporate administered pension plans which benefit union members.)

lives: whether they will or will not work, what they will do and how much they will be paid. With respect to the construction trade, petitioners put this point eloquently (Pet. Br. 54):

> To construction union workers, who move from employer to employer without any company identification, the union constitutes many things that to others are divided. It is not just their representative in dealing with employers concerning grievances, wages, etc.; it is, indeed, also the source of their employment and the source of their pensions, sick, vacation and other fringe benefits. Unlike other workers, the construction union represents to them both company-employer and union. It is all they have to look to for existence and security.

The very concentration of authority which gives unions their legitimate bargaining power contains risks—common to any system of majority rule—of improper suppression of minority or individual interests. As Justice Frankfurter noted, concurring in *A.F. of L.* v. *American Sash Co.*, 335 U.S. 538, 545:

> If concern for the individual justifies incorporating in the Constitution itself devices to curb public authority, a legislative judgment that his protection requires the regulation of the private power of unions cannot be dismissed as unsupportable. A union is no more than a medium through which individuals are able to act together; union power was begotten of individual helplessness. But that power can come into being only when, and continue to exist only so long as, individual aims are seen to be shared in common with other members of the group.

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> There is a natural emphasis, however, on what is shared and a resulting tendency to subordinate the inconsistent interests and impulses of individuals. * * *

Because the union is vital to the worker's economic well-being, the union-worker relationship is peculiarly susceptible of undue influence. While a citizen may feel perfectly free to write his Congressman or state legislator about some wrong done him by the federal or state government, he may be somewhat more reluctant to criticize union management, fearing that when union officials look around the hall to pick men for a job they might look past the trouble-maker.

A union member may find irresistible the union's demand—through its steward on the jobsite—for contributions fixed as a regular percentage of days worked and money earned. Section 610 reduces this institutional pressure by forbidding the unions from making direct political contributions from money that is effectively assessed. This reduces the union's interest in enforcing contributions from members, while leaving the members free to express their political views and make political contributions through a political action organization.

In *International Association of Machinists* v. *Street*, 367 U.S. 740, 766, discerning a "congressional concern over possible impingements on the interests of individual dissenters from union policies," this Court recognized the right of a vocal dissenter not to pay assessments to support political policies with which he disagreed. However, given the pervasive role of the union in the lives of members, such vocal protest may be expected to be a rarity. Indeed, the very

difficulty of estimating the effect on union members of pressures short of explicit sanctions, indicates the propriety of the broader prohibitions of Section 610 which are not restricted to giving dissenters the power to "opt out" and do not attempt to draw a sharp distinction between "voluntary" and "involuntary" payments.

Just as the federal government must be constantly subject to scrutiny against impingements, subtle or overt, on the right to free expression, so must union and corporate "governments" be subject to similar examination. As Mr. Justice Douglas noted, concurring in *Street, supra*, p. 776, "[o]nce an association with others is compelled by the facts of life, special safeguards are necessary lest the spirit of the First, Fourth, and Fifth Amendments be lost and we all succumb to regimentation."

B. THE STATUTE DOES NOT VIOLATE THE CONSTITUTIONAL RIGHTS OF LABOR UNIONS OR THEIR MEMBERS

1. The First Amendment

As with their attack on the indictment, the evidence and the charge, petitioners predicate their constitutional argument on the proposition that Section 610, as applied, prohibits "officers, agents and members of the union from forming a parellel political organization and utilizing the union leaders, officers and agents in such political organization, in the obtaining, pooling and expending of direct voluntary contributions for political purposes" (Pet. Br. 79). We believe that petitioners' formulation begs the constitutional question. It is the very fact that Section 610 does not

apply to prevent the formation of "parallel political organization[s]" to give public expression to union political sentiment that points to its legitimate and narrow reach. Thus as Senator Taft, the sponsor of the 1947 legislation, made clear: "If the labor people should desire to set up a political organization and obtain direct contributions for it, there would be nothing unlawful in that" (93 Cong. Rec. 6439, 6440). There is no bar to the formation of voluntary political organizations by which union majorities may express their political sentiments. Nor has there been any hesitancy in the formation of such organizations, through which labor's voice may be heard.[15]

In our view the constitutional question presented is a narrow one: Whether a union, which, like a corporation, is organized for other than political purposes, may be barred from making direct contributions to candidates out of its general funds.

The barring of such direct contributions does not unduly restrict the collective voice of the union. Even the general funds of the union may be used for a variety of political activities, though it may not make

[15] The application of Section 610 to such organizations as COPE; Trainmen's Political Educational League; Amalgamated Meatcutters and Butcher Workmen of North America, COPE; the Int'l. Ladies Garment Workers Union, 1964 Campaign Committee, New York, N.Y.; state A.F.L.-C.I.O. COPE; and G.B.B.A. Political Education League, and to other political committees is not raised by the facts in this case, and is therefore not properly before this Court. It is enough to note, however, as we have indicated in the text, that to the extent that these are voluntary political organizations by which persons who are union members give public expression to their political views, they are not within the reach of Section 610.

a direct financial contribution to the campaign on behalf of particular federal candidates.[16] Congress could legitimately conclude that the ban on direct electioneering did not significantly impinge on the right of unions to express their views, while at the same time it furthered the narrow, well-defined and highly important objectives discussed above—to reduce undue institutional influence by unions on federal elections, to preserve the purity of such elections against the use of aggregated wealth, and to protect union members holding political views contrary to the unions. Indeed, even the dissenting opinion in *Auto. Workers, supra*, 352 U.S. at 598, n. 2, recognizes that contributions and expenditures may stand upon different constitutional footing than expression of political opinion in other ways.

Nor does the bar on direct contributions from regular union funds infringe the rights of individual members of the union. As noted above Section 610 does not bar the formation of voluntary political organizations by unions or union members to express the political sentiments of members, even by the pooling of money voluntarily contributed for the purpose of making political contributions. To the contrary, the protection of

[16] See Rauh, *Legality of Union Political Expenditures*, 34 So. Cal. L. Rev. 152, for a discussion of how little § 610 limits union political activity. For example, the statute does not apply to state elections. Furthermore, regular union periodicals or newspapers financed with union funds may contain political material and be distributed to those accustomed to receiving copies. See *C.I.O., supra*. Nonpartisan registration drives are similarly outside the ambit of the statute and distributions of voting records of candidates are also legitimate.

minority interests serves a legitimate purpose which does not run afoul of the First Amendment. Indeed, "coercive elimination of dissent" is the very antithesis of the "freedom to differ" which the First Amendment was designed to protect. *Board of Education* v. *Barnette*, 319 U.S. 624, 641–642. The amendment rests on the premise "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press* v. *United States*, 326 U.S. 1, 20. Or, as more recently stated in the reapportionment decisions, "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live" *Wesberry* v. *Sanders*, 376 U.S. 1, 17; *Reynolds* v. *Sims*, 377 U.S. 533, 555. In sustaining that right by preventing union majorities from dictating to minorities the statute protects, rather than restricts, First Amendment freedoms.

2. Alleged Overbreadth, Vagueness and Lack of Fair Notice

Petitioner's arguments as to the alleged vagueness of the statute amount essentially to a complaint that their plan to avoid the statute has proved less successful than they had hoped. The statute is not rendered vague by the fact that a subterfuge was proved to be such. The statute is clear in prohibiting what was done here—the contribution of union money to candidates in federal elections. There is no issue here as to the scope of "expenditure" or what type of expenditure is within the reach of the statute—one of the problems that troubled the concurring Justices in *United States*

v. *C.I.O.*, 335 U.S. 106, 151. Here we are dealing simply with a direct "contribution" by a "labor organization" to candidates for Federal office. These are not vague or indefinite words, but reach a precise and readily ascertainable type of conduct. See *United States* v. *O'Brien*, 391 U.S. 367, 381. They convey a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. The Constitution requires no more." *United States* v. *Petrillo*, 332 U.S. 1, 8; *Roth* v. *United States*, 354 U.S. 476, 491–492.

The fact that a case may turn on a contested factual issue—in this case, whether the Fund was a Union fund, its monies Union monies—does not render the statute vague.[17] "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense." *United States* v. *Petrillo*, *supra*, 332 U.S. at 7.

3. The claim of arbitrary discrimination

There is no substance to the claim that by virtue of the convictions in this case workers are practically prohibited from political action in any form, while those opposed to labor are given free reign to influence elections. As we have already stressed, the power of

[17] Men can, on pain of criminal sanction, constitutionally be required to make numerous decisions involving close factual questions. See, *e.g.*, *United States* v. *Alford*, 274 U.S. 264; *United States* v. *Ragen*, 314 U.S. 513; *United States* v. *Petrillo*, 332 U.S. 1.

union majorities to express their collective political sentiments through voluntary political organizations is not covered by the statute. Accordingly, it is clear that members of a union remain free under Section 610 to associate for political purposes, including making contributions to federal candidates.

Moreover that Congress chose in Section 610 to deal only with the political contributions of national banks, corporations and labor unions hardly establishes unconstitutional discrimination. As the Supreme Court has held, Congress may act selectively, and a prohibition within its power directed at a particular class is not rendered invalid because it does not also reach every other class upon which Congress may constitutionally place similar limitations. *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4; *United States* v. *Petrillo*, 332 U.S. 1, 8–9.

III

THE JURY VERDICT DID NOT ENTITLE PETITIONERS TO AN ACQUITTAL

Petitioners argue that since the jury found that "a willful violation of Section 610 of Title 18, United States Code, was not contemplated," it must also have found that the conspiracy was not willful—*i.e.*, that the agreement was not with intent to violate Section 610. By virtue of this finding, so the argument runs, the jury should have acquitted appellants for, in order to be guilty, the alleged conspirators must have known that the object of the conspiracy was unlawful—the very finding precluded by the jury's determination

that petitioners' violation of Section 610 was not willful (See Pet. 29–30). But this argument is not convincing. The charge and verdict are entirely consistent with the penalty provisions of the statute.[18]

The trial court repeatedly made clear in its charge that in order to convict of the conspiracy the jury had to find that the conspiracy was willful (A. 1117)—i.e., "done voluntarily and purposely and with the specific intent to do that which the law forbids; that is to say, with bad purpose either to disobey or to disregard the law" (A. 1110; see similarly A. 1109, 1111, 1117–1118). Moreover, the verdict form returned by the jury contained the conclusion that each defendant was found "guilty as charged in the indictment" (A. 1125–1126) and the indictment alleged that the petitioners "unlawfully, wilfully, and knowingly" conspired (A. 14). In short, in finding petitioners guilty of the conspiracy the jury must have found it to be willful in the sense that petitioners knew they were conspiring to make political contributions from union funds, the only sense of willfulness required for a conspiracy conviction under this statute.

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[18] The penalty provision of Section 610 provides:

"Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and *if the violation was willful*, shall be fined not more than $10,000 or imprisoned not more than two years, or both" (emphasis added).

Petitioners rest their argument essentially on an instruction coming near the end of the charge (A. 1119):

> * * * you are instructed that if under the evidence and the other instructions you find the defendants, or any of them, guilty of willfully conspiring to * * * [violate] * * * Section 610, but find that said conspiracy did not contemplate a willful violation of Section 610, then your verdict of guilty should so state.

Petitioners should not be heard to base their argument on this instruction since it plainly contemplated the possibility of the verdict in fact rendered, and when it was read by the court prior to the charge to the jury, one of the defense counsel stated that he had, "[n]o objection" (A. 1095). See Rule 30, Fed. R. Crim. P.; *White* v. *United States*, 394 F. 2d 49 (C.A. 9).

When examined in light of the entire charge and in view of the fact that a conviction under Section 610 may be either a felony or a misdemeanor, both the instruction and the verdict are intelligible. The judge instructed the jury on how to return a verdict which would be responsive to the penalty provisions of the statute. The conclusion to be drawn from the jury verdict in light of the charge is that, while the jurors believed Local 562 and the individual petitioners con-

spired to have Local 562 make political contributions—the conduct which Section 610 proscribes—they may have concluded that petitioners had not acted with intent to flout the law, and that their conduct was not "willful" in that sense. Cf. *United States* v. *International Minerals & Chemical Corp.*, 402 U.S. 558. Contrary to petitioners' suggestion, "[t]here need not, of course, be proof that the conspirators were aware of the criminality of their objective" (*Ingram* v. *United States*, 360 U.S. 672, 678). Alternatively, it is possible that given the judge's instructions, the jury believed petitioners conspired knowing that what they did was in violation of Section 610, but that the jury did not think petitioners had a sinister or corrupt motive.

If the failure of the jury to find petitioners guilty of a felony is, contrary to what we have suggested, viewed as inconsistent with their verdict of a misdemeanor violation of Section 610, that would still not undercut the verdict. The verdict would not then differ materially from cases in which courts have ruled that inconsistent verdicts do not require reversals of convictions. *E.g.*, *Dunn* v. *United States*, 284 U.S. 390; see *United States* v. *Dotterweich*, 320 U.S. 277, 279; *United States* v. *Carbone*, 378 F. 2d 420, 422–423 (C.A. 2), certiorari denied, 389 U.S. 914.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be affi

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